No. 95-1636

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EXXON CORPORATION,
Petitioner,

v.

JOHN RICHARD LUDBROOKE YOUELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is it improper for a federal court to dismiss a marine insurer's declaratory suit in deference to an insured's parallel state court action when the coverage dispute "hinges" on a novel question of federal maritime law?

LIST OF PARTIES

The parties in this action are as identified by Petitioner Exxon Corporation ("Exxon") in its petition for a writ of certiorari.

Pursuant to Rule 29.6 of the Rules of this Court, a list identifying all parent companies and nonwholly owned subsidiaries of Respondents John Richard Ludbrooke Youell, et al. ("Underwriters"), is found in Appendix A.

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BRIEF IN OPPOSITION

Underwriters respectfully request this Court to deny Exxon's petition for a writ of certiorari to review the most recent judgment and opinion entered by the Second Circuit in this case.

STATEMENT OF THE CASE

This is a quintessential commercial maritime case arising from the stranding of the supertanker *Exxon Valdez* off Alaska. The dispute is over whether Exxon's marine pollution losses are covered under a global marine insurance contract. Federal maritime law governs the proceedings.

This Court previously remanded this case to the Second Circuit for further consideration in light of *Wilton v. Seven Falls Co.*, 515 U.S. ——, 115 S. Ct. 2137 (1995), a decision handed down by this Court after the Second

Circuit's initial ruling reinstating Underwriters' declaratory suit in New York.

In its petition, Exxon claims that the Second Circuit "disobeyed" this Court and failed to follow *Wilton* when again deciding to reinstate Underwriters' declaratory action in New York. Exxon is wrong. The filing of this Petition, premised on Exxon's baseless allegation that the Second Circuit ignored *Wilton*, is consistent with Exxon's continuing quest to delay the action in New York. In this way, Exxon hopes it will achieve by default its goal of having this dispute decided in Texas—where Exxon's state court action is pending.

The Second Circuit's opinion demonstrates that it carefully considered and correctly applied the guidelines established by this Court in *Wilton*. On remand, the Second Circuit analyzed the district court's abstention decision under the *Brillhart* "discretionary" standard,[1] rather than under the *Colorado River/Moses H. Cone* "exceptional circumstances" test[2] it had used before *Wilton* was decided. Because an issue of federal maritime law involving a novel federal question—whether maritime losses caused by an insured's recklessness are fortuitous—is critical to the resolution of the parties' dispute, the Second Circuit found that, under the *Brillhart* test, this dispute could not "better be settled" in Texas.

In view of the federal interest in these proceedings, the Second Circuit concluded that federal jurisdiction should be exercised, and therefore again reversed the district court's decision to dismiss Underwriters' declaratory suit.

The Second Circuit has fully complied with this Court's directive to consider *Wilton*. The result reached by the

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[1] *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942).

[2] *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

Second Circuit is the right one. This case does not warrant this Court's further review.

A. Background Facts

1. The Stranding of the *Exxon Valdez*

On March 24, 1989, the *Exxon Valdez* ran aground on Bligh Reef, a well-known and well-marked rock shoal located in Prince William Sound well outside the boundaries of the charted traffic lanes leading into and out of the port of Valdez, Alaska. The stranding ruptured the vessel's cargo tanks, spilling more than 10.8 million gallons of crude oil into the sea.

The *Exxon Valdez* was commanded by Joseph J. Hazelwood, a known, uncontrolled alcoholic. Captain Hazelwood had been drinking during the hours immediately preceding the incident.

After the grounding, a federal grand jury returned criminal indictments against Exxon. All criminal charges required Exxon's knowledge of the circumstances relating to the stranding and resulting pollution; some required evidence of Exxon's intentional misconduct. In September 1991, Exxon pled guilty to certain crimes and settled all criminal and civil claims brought by the federal government and Alaska, agreeing to pay damages, fines and penalties.

In addition, in a federal lawsuit in Alaska brought against Exxon by commercial fishermen, property owners and others, a jury found that Exxon's misconduct relating to the operation of the *Exxon Valdez* was "reckless" and that such "recklessness" caused the stranding. The jury assessed Exxon $287 million in compensatory damages, and found Exxon's "recklessness" so "reprehensible" that it ordered Exxon to pay $5 billion in punitive damages.[3]

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[3] Although Exxon has persisted throughout the parties' litigation in terming the grounding of the *Valdez* "accidental" (*see, e.g.*, Pet. at p. 2), the Alaskan jury was charged that it could find

2. Exxon's Claims for Coverage

Exxon has demanded insurance coverage from Underwriters for pollution costs, expenses and liabilities allegedly resulting from the stranding of the *Valdez*.

Exxon's claims are made under certain custom manuscript Global Corporate Excess insurance agreements ("GCE Agreement") negotiated and drafted by Exxon and its New York and London insurance brokers.[4] The GCE Agreement insured specific risks relating to Exxon's world-wide operations for a twelve-month period commencing November 1, 1988, and was subscribed to individually and severally by Underwriters (certain underwriters at Llyod's, London and more than 100 other London market and international insurance companies headquartered all around the globe).

The GCE Agreement was negotiated in New York and London. At the time the Agreement was entered into, Exxon was headquartered in New York. Exxon paid its premiums in New York. In the event of suit, Underwriters agreed to submit to jurisdiction in New York. Underwriters also agreed to accept service of process in New York and designated service agents in New York, including the New York State Insurance Commissioner. New York was designated as the site for any arbitration between the parties.

Underwriters denied coverage of Exxon's claims under the GCE Agreement for a number of reasons, including

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Exxon "reckless" only if it determined that Exxon acted with "subjectively conscious" disregard of grave danger or risk of harm. (*In re Exxon Valdez*, C.A. 89-095 (D. Alaska June 13, 1994)). The jury was further charged it could assess punitive damages against Exxon only if it found Exxon's misconduct to be "reprehensible." *Id.* (D. Alaska September 16, 1994).

[4] Exxon claimed coverage under Sections I, IIIA and IIIB of the Agreement. Section I addresses Exxon's first-party property loss or damage. Section IIIA focuses on Exxon's marine liabilities; Section IIIB deals with other third-party liabilities.

Exxon's misconduct in causing the grounding of the *Valdez* and the pollution. Thereafter, the parties engaged in a number of non-binding alternative dispute resolution proceedings. To facilitate the continuation of good faith discussions concerning Exxon's coverage claims, Underwriters and Exxon agreed in August 1992 that neither would institute legal proceedings without prior notification to the other. Underwriters and Exxon also executed a tolling agreement to suspend the running of the limitations period governing Exxon's claims during the parties' discussion.

B. The Texas and New York Actions

1. Exxon's Texas Suit

In the midst of the parties' ongoing negotiations, and notwithstanding the clear indication that any unresolved dispute was to be resolved in New York, Exxon—without notice or warning—filed suit on August 4, 1993 in Texas state court. That case is presently pending in Harris County, Houston, before Judge Carolyn Marks Johnson.

Exxon's suit in Houston advanced its coverage claims under Sections I, IIIA and IIIB of the GCE Agreement, thereby rejecting arbitration.[5] Exxon's complaint charged

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[5] Sections I and IIIA of the GCE Agreement provide for arbitration in New York upon the consent of both parties; Section IIIB provides for mandatory arbitration in New York upon request of either party. Although Exxon repudiated arbitration by commencing suit in Houston, Underwriters requested arbitration under the mandatory arbitration clause of Section IIIB. As a result, Exxon's claim under Section IIIB is the subject of arbitration in New York.

Exxon's claim under Section IIIA is the subject of both the New York and the Texas actions. Last month, the Texas Supreme Court issued an order staying indefinitely any trial date in Texas, pending its consideration of Underwriters' petition for a writ of mandamus on issues relating to how and when Exxon's claim under Section IIIA will be tried. On May 3, 1996, after Exxon agreed that separate juries should hear its coverage claim and, if neces-

breach of contract, breach of the covenant of good faith and fair dealing, and violations of the Texas Insurance Code.

The Houston forum chosen by Exxon for its action has no connection to the insuring agreement or Exxon's claims under the contract. There is no reference to Texas in the 128 pages of the GCE Agreement. Other than the fact that Exxon moved from New York to Irving, Texas (near Dallas, not Houston) *after* the GCE Agreement was signed and *after t*he grounding of the *Exxon Valdez*, there is no tie between this dispute and Texas.

As part of its campaign to avoid federal jurisdiction, Exxon did not sue one of the subscribing underwriters that was entitled to a federal court forum as an instrumentality of a foreign sovereign, releasing its claims against that underwriter in the amount of $8,199,400.00, plus interest and other damages.[6] Exxon also announced in its state court complaint that it would "release and waive" any claim it might have against any other underwriter that might be an agency or instrumentality of a foreign state.

At the outset of the Texas proceedings, Exxon twice vigorously resisted removal to federal court. Exxon foiled the first removal, effected pursuant to the express authority of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[7] by "agreeing"—after the case was removed—to arbitrate Section IIIB in New

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sary, its claim under the Texas Insurance Code, the stay was lifted. Exxon's Section I claim, under which Exxon had sought in excess of $2 billion, was settled for $300 million, pursuant to an agreement reached days before the release of the Second Circuit's January 12, 1996 reinstatement of Underwriters' declaratory action.

[6] In its complaint, Exxon expressly released Qatar General Insurance and Reinsurance Company, which could have availed itself of federal court jurisdiction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*

[7] 9 U.S.C. § 201, *et seq.* *See* 9 U.S.C. § 205.

York and taking steps to sever and stay its Texas state court claim under Section IIIB pending the outcome of the New York arbitration. Exxon also frustrated the second removal, effected by Norske Triton Insurance Company, Ltd. ("Star"), a foreign sovereign. Although Exxon fought this removal on a number of different grounds, Exxon ultimately achieved a remand only after releasing and dismissing its claims against Star ($4,270,475.00, plus interest and other damages) in order to return to Houston state court.

2. New York Proceedings

After Exxon commenced its Texas action, Underwriters filed a complaint against Exxon in the Southern District of New York on August 30, 1993. The complaint seeks a declaration that there is no coverage for Exxon's claims and that Underwriters acted in good faith in denying Exxon's claims.

Exxon moved to dismiss or stay Underwriters' declaratory suit, contending that the district court lacked jurisdiction, or, alternatively, seeking a dismissal or stay of the federal proceedings in deference to its Texas action.

C. The District Court's Abstention Decision

The district court properly recognized that it had subject matter jurisdiction over Underwriters' declaratory suit, determining that "insofar as this case involves marine insurance, it falls within the admiralty jurisdiction." (Pet. App. D, p. D-3).[8] The district court therefore treated Exxon's motion as one seeking abstention in favor of its Texas action. Citing to the abstention analysis established by this Court in *Colorado River* and *Moses H. Cone*, the district court decided abstention was justified, and dismissed Underwriters' complaint.

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[8] So intent was Exxon on avoiding federal jurisdiction that it resisted even this unassailable conclusion. On appeal to the Second Circuit, Exxon finally conceded this is an admiralty case.

The district court rested its decision to abstain upon the third factor under the *Colorado River* abstention test —avoidance of piecemeal litigation—terming that factor "by far the most significant." (*Id.* at p. D-13). The district court also found that the fifth *Colorado River* factor—the source of the rule of decision—was marked by "a strong state interest in insurance regulation and an absence of significant federal issues" and hence "points moderately towards abstention." (*Id.*). The fourth factor —the order in which jurisdiction was obtained—slightly favored abstention, according to the district court,[9] with the remaining factors "contribut[ing] nothing to the mix." (*Id.*).

D. The Second Circuit's Reversal

On February 21, 1995, the Second Circuit reversed, finding that the district court had abused its discretion in abstaining. (Pet. App. C, pp. C-7 n.2, C-17). The Second Circuit, like the district court, analyzed the abstention issue under the *Colorado River* test.

Unlike the district court, the Second Circuit recognized the importance of federal maritime law, agreeing with Underwriters that federal admiralty law provides the rule of decision governing this case.

Specifically, the Second Circuit rejected Exxon's argument that the "fortuity rule" arises under state law. Citing to this Court's decision in *Orient Mutual Ins. Co. v. Adams*, 123 U.S. 67 (1887), and a host of decisions thereafter from numerous Courts of Appeals, the Second

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[9] In this regard, the district court cited to the "significance" of what was then a March 27, 1995 trial date in the Texas action. (*Id.* at p. D-6). Exxon requested and was granted such a trial listing only after oral argument had been scheduled by the district court on Exxon's motion to dismiss or stay. After the district court granted its motion, Exxon then agreed it would not seek a trial setting until late 1995 or early 1996. As previously indicated, until recently, the Texas trial proceedings were the subject of a stay issued by the Texas Supreme Court. *See supra* at pp. 5 & 6 n.5.

Circuit determined that "the fortuity rule is indeed a creature of federal law. Federal courts sitting in admiralty have been applying some variation of the fortuity rule in marine insurance cases for over a hundred years." (*Id.* at p. C-9).

The Second Circuit found "[l]ess clear . . . how the fortuity rule regards losses caused by the insured's own recklessness." (*Id.* at p. C-10) ("While negligent losses are fortuitous, and wilful ones are not, admiralty courts have yet to assign losses caused by the insured's own reckless conduct to either camp."). This "precise issue" —namely, the scope of the "fortuity rule" in marine insurance cases and "whether a marine insurer is liable under a policy for losses caused by an insured's recklessness"—was determined to be an issue of "first impression" (*id.* at pp. C-11, C-12), which, as a matter of federal admiralty law, a federal court should resolve. (*Id.* at p. C-12). Because "a major determinant of the Underwriters' liability to Exxon will be whether maritime losses caused by an insured's recklessness are fortuitous" (*id.* at p. C-17), the Second Circuit concluded that a federal court must retain jurisdiction and decide the case. (*Id.* at pp. C-17, C-18).

E. This Court's Remand to the Second Circuit

On May 15, 1995, Exxon's petition for a writ of certiorari was filed with this Court. Exxon sought review on the basis that the Second Circuit had erred when reversing the district court's abstention decision because it had applied the *Colorado River* "exceptional circumstances" test rather than the "discretionary" test set forth in *Brillhart*.[10]

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[10] Exxon also requested this Court's review on the grounds that the Second Circuit had ignored this Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), by concluding that federal maritime law governs the fortuity issue in this case. Exxon's request was meritless, for reasons Underwriters have previously detailed at length. (See Underwriters' Brief in Op-

Thereafter, on June 12, 1995, this Court rendered its decision in *Wilton*, endorsing the *Brillhart* test and affirming a stay of a federal declaratory suit in deference to a state court action in a case governed exclusively by state law.

On October 2, 1995, this Court vacated the Second Circuit's judgment and remanded this case to the Second Circuit for further consideration in light of *Wilton*.

F. The Second Circuit's Opinion on Remand

Following this Court's remand, the Second Circuit requested and received letter briefs from the parties on the significance of *Wilton* and on the status of proceedings in the Texas state court action.

On January 12, 1996, the Second Circuit issued its *per curiam* opinion. Pursuant to the instructions it had received from this Court, the Second Circuit reconsidered its initial ruling in light of *Wilton* and, as a result, analyzed the district court's decision to abstain under the "more discretionary" *Brillhart* test rather than under the *Colorado River* standard it had previously used. (Pet. App. A, pp. A-3, A-5).

When applying the *Brillhart* test, the Second Circuit recognized that the critical question is whether the parties' litigation can "better be settled" in the state court proceeding than in the federal suit. (*Id.* at p. A-6).

The Second Circuit found that this case *cannot* "better be settled" in Texas state court because it turns on an important and novel issue of federal maritime law which makes federal review essential:

> The issue here—whether maritime losses caused by an insured's recklessness are fortuitous—"is a novel

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position, *Exxon v. Youell*, No. 94-1871 (filed June 14, 1995), at pp. 11-20). In its present petition, Exxon has abandoned its request for certiorari on this issue.

> issue of federal admiralty law" that "is truly a brooding omnipresence." *Id.* [*Youell v. Exxon Corp.*, 48 F.3d 105 (2d Cir. 1995)] at 114. Federal adjudication of this issue will not constitute "[g]ratuitous interference with the orderly and comprehensive disposition of [the] state court litigation." *Brillhart*, 316 U.S. 495, 62 S.Ct. at 1176. Nor can this issue "better be settled" in Texas state court: "[A] federal question of first impression must all but demand that the federal court hear the case . . . . While we loathe wasting judicial resources, it would be worse to cede federal review of an issue of federal law merely because Exxon won the race to judgment in state court." *Youell*, 48 F.3d at 111-12, 114.

Id. at p. A 7.

In distinguishing this dispute from cases involving only state law issues, the Second Circuit noted that "the *Wilton* Court specifically declined 'to delineate the outer boundaries of [*Brillhart*] discretion in . . . cases raising issues of federal law.' " *Id.* (quoting *Wilton*, 115 S.Ct. at 2144). Because this case presents an important and novel federal admiralty question, the Second Circuit decided there was no point in a further remand to the district court, which it assumed "would again abstain in deference to the Texas litigation." *Id.* Because the Second Circuit determined that abstention in this case would constitute an abuse of discretion under the *Brillhart* test, the Second Circuit reinstated Underwriters' declaratory suit. *Id.* at p. A-8.[11]

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[11] Exxon responded to this ruling by urging the Texas state court to disregard the Second Circuit's determination that federal maritime law governs the fortuity issue and instead decide fortuity under Texas law. As a result of Exxon's "collateral attack" on the Second Circuit's choice-of-law finding, Underwriters removed the Texas action to federal court. Exxon succeeded in achieving a remand by persuading the district court that its effort to have fortuity decided under Texas law did not constitute an attack on the Second Circuit's ruling that fortuity must be resolved as a matter of federal maritime law.

REASONS FOR DENYING THE WRIT

The writ should be denied because it seeks review of an interlocutory ruling that fully complies with this Court's previous remand instructions and presents no question warranting this Court's further consideration.

I. THERE IS NO NEED FOR INTERLOCUTORY REVIEW.

It is well-settled that this Court's certiorari jurisdiction generally is not exercised for purposes of an interlocutory review. *See, e.g., American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893) ("Clearly . . . this Court should not issue a writ of certiorari to review a decree of the circuit court of appeals from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."), *cited in Virginia Military Institute v. United States*, 113 S.Ct. 2431 (1993)(mem.) (Scalia, J., concurring). *Accord Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The decision made by the Second Circuit—following its adherence to this Court's directions on remand—to reverse and remand the district court's jurisdictional decision is in no sense that rare type of extraordinary ruling requiring this Court's interlocutory review. To the contrary, the "lack of finality" of the Second Circuit's judgment is a factor that "of itself alone furnish[es] sufficient ground for the denial of the application [for certiorari]." *Ibid.*

II. THE SECOND CIRCUIT COMPLIED WITH THIS COURT'S DIRECTIVE TO RECONSIDER ITS INITIAL RULING IN LIGHT OF *WILTON* AND PROPERLY REVERSED THE DISTRICT COURT'S ABSTENTION DECISION IN A CASE GOVERNED BY FEDERAL MARITIME LAW.

Exxon charges the Second Circuit with "flat disobedience" of this Court's mandate to reconsider this case in

light of *Wilton*. (Pet. at p. 10). According to Exxon, the Second Circuit's decision to reinstate Underwriters' suit "flies in the face of this Court's clear holding in *Wilton*." (*Id.* at p. 12).

Exxon has scoffed at the Second Circuit's determination that federal courts should retain jurisdiction to decide important and novel issues of federal maritime law, deriding this conclusion as a failed effort to distinguish *Wilton*. (*Id.* at pp. 15, 16). The Second Circuit's ruling is dismissed as no more than a "result oriented conclusion" (*id.* at p. 16) that "flies in the face" of the "saving to suitors" clause, 28 U.S.C. § 1333(1), which Exxon claims reflects a Congressional determination that state courts, not federal courts, should decide important and novel questions of federal admiralty law, if a plaintiff prefers a state court forum. (*Id.* at pp. 16, 17). Exxon has also attempted to attach significance to the fact that the Second Circuit itself applied the *Brillhart* test rather than remanding to the district court for that purpose, claiming that the "refusal to remand the case to the district court is a wilful failure to follow this Court's binding precedent." (*Id.* at pp. 12, 13, 20-25).

Exxon's charges are without merit on all counts. In an effort to create a conflict between this Court and the Second Circuit that does not exist, Exxon has mischaracterized both what this Court said in *Wilton* and *Brillhart* about the federal interest in cases involving concurrent federal and state court litigation, and also what the Second Circuit did on remand and why.

A. *Wilton* and *Brillhart* Recognize That the Federal Interest in a Declaratory Suit Is Different in a Case Involving a Federal Law Issue Than in a Dispute Governed Exclusively by State Law Issues.

In *Wilton*, this Court resolved a split among the circuit courts concerning whether the *Brillhart* "discretionary"

standard or the *Colorado River/Moses H. Cone* "exceptional circumstances" test governs a district court's decision to dismiss or stay a declaratory suit in favor of a parallel state court proceeding. 115 S.Ct. at 2140. In addressing the issue in that action—which was governed exclusively by state law—the Supreme Court endorsed the *Brillhart* test and affirmed the lower court's stay of the federal declaratory suit in deference to the state court action. *Id.* at 2144.

The *Brillhart* guidelines specifically address cases governed by state or "local" law. 316 U.S. at 496. *Brillhart* expressly distinguished such cases from cases involving issues governed by federal law. *Id.* at 495. Indeed, *Brillhart* makes clear it is in cases presenting issues "not governed by federal law" that a federal court's "[g]ratuitous interference with the orderly and comprehensive disposition of state court litigation should be avoided." *Id.*

In *Wilton*, this Court emphasized *Brillhart*'s caution against a federal court's "gratuitous interference" in litigation that may more sensibly be handled as a matter of state law by the state court:

> The Court [in *Brillhart*] explained that "(o)rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, *not governed by federal law*, between the same parties."

115 S.Ct. at 2140, quoting *Brillhart*, 316 U.S. at 495 (emphasis added).[12]

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[12] Remarkably, Exxon tries to mislead this Court concerning its own decisions regarding the importance of the distinction between federal and state law issues in cases involving concurrent federal and state court litigation. Exxon has "quoted" what this Court said in *Brillhart* as follows:

[Continued]

As this Court recognized in *Wilton*, the critical inquiry under *Brillhart* is therefore whether the nature of the controversy between the parties to the federal suit is such that their dispute "can *better* be settled" in the state court proceeding. *Brillhart*, 316 U.S. at 495, *quoted in Wilton*, 115 S.Ct. at 2140 (emphasis added).

Surely there *are* instances where a state court can *better* handle disputes to be resolved solely under state law, and where, for that reason, continuing federal court involvement would constitute "gratuitous interference." Indeed, that is exactly why this Court determined in *Wilton* that the lower court was justified in deciding, under the *Brillhart* test, that the litigation could "better be settled" in state court:

> . . . *Brillhart* indicated that, at least where another suit involving the same parties and presenting opportunity for ventilation of *the same state law issues* is pending in state court, a district court might be indulging in "(g)ratuitous interference," if it permitted the federal declaratory action to proceed.
>
> *Brillhart*, without more, clearly supports the District Court's decision in this case.

115 S.Ct. at 2141, quoting *Brillhart*, 316 U.S. 495 (emphasis added).

This Court made clear in *Wilton*, however, that its decision did no more than analyze a district court's dis-

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[12] [Continued]

> [o]rdinarily it [is] vexatious for a federal court to proceed in a declaratory judgment suit where another suit [*presenting the same issues*] is pending in a state court.

(Pet. at p. 21) (emphasis added).

In its "quote," Exxon has *deleted* this Court's use of the words "not governed by federal law" and substituted in their stead "[presenting the same issues]." In its relentless effort to eliminate any vestige of federal maritime law from these proceedings, perhaps Exxon hopes this Court might forget what it actually said in *Brillhart* and repeated in *Wilton* about issues governed by federal law.

cretion to abstain from a declaratory suit in favor of a concurrent state court action when the parties' dispute involves only state law issues. This Court expressly did *not* address the issue of what discretion a federal court has in deciding whether to proceed in a declaratory action raising issues of federal law:

> We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example, *cases raising issues of federal law* or cases in which there are no parallel state proceedings. Like the Court of Appeals, we conclude only that the District Court acted within its bounds in staying this action for declaratory relief where parallel proceedings, presenting opportunity for ventilation of the same state law issues, were underway in state court.

115 S.Ct. at 2144 (emphasis added).

Because the case at bar *does* raise—indeed, turns on—important federal law issues, it involves a federal interest of the very type that this Court emphasized was absent in both *Wilton* and *Brillhart*. The Second Circuit properly recognized that distinction when applying the *Wilton* and *Brillhart* guidelines.

B. The Second Circuit Correctly Applied the *Wilton* and *Brillhart* Guidelines and Properly Concluded That an Important and Novel Issue of Federal Admiralty Law Critical to the Resolution of This Dispute Cannot "Better Be Settled" in Texas State Court.

Contrary to Exxon's claim, the Second Circuit was clearly mindful of the remand instructions it was previouly given by this Court and adhered to them. The Second Circuit explained as follows its understanding of this Court's charge to reconsider its earlier opinion in light of *Wilton*:

> The Supreme Court [in *Wilton*] endorsed the *Brillhart* test, finding that "[d]istinct features of the

> Declaratory Judgment Act . . . justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the 'exceptional circumstances' test of *Colorado River* and *Moses H. Cone*." In so holding, the Court overturned precedent in this and other circuits.
>
> On remand, therefore, we consider afresh whether application of the more discretionary *Brillhart* test alters our initial decision to reinstate the Underwriters' declaratory judgment action.

Id. at p. A-5 (quoting *Wilton*, 115 S.Ct. at 2142) (citations omitted).

The Second Circuit fully appreciated both the difference between the *Colorado River* test and the *Brillhart* test and what the *Brillhart* test involves, as articulated by this Court in *Wilton*:

> Under *Colorado River-Moses H. Cone* abstention, a district court may decline to exercise jurisdiction over a case only under exceptional circumstances that relate to federal-state comity. *See Wilton*, —— U.S. at ——, 115 S.Ct. at 2141-42. The *Brillhart* abstention doctrine on the other hand—now clearly applicable to declaratory judgment actions such as the one before us—gives the district court broader discretion to determine "whether and when to entertain an action . . ., even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Id.* at ——, 115 S.Ct. at 2140. Hence, under *Brillhart*, the question for a district court presented with a declaratory judgment suit, is " 'whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, *can better be settled in the proceeding pending in the state court.*' " *Id.* (quoting *Brillhart*, 316 U.S. 495, 62 S.Ct. at 1176).

Id. at pp. A-5, A-6 (emphasis added).

The Second Circuit also understood why *Brillhart*—as well as *Wilton*—cautioned against "gratuitous interfer-

ence" by a federal court in litigation involving only state law issues that can "better be settled" in state court:

> Underlying the *Brillhart* decision was the Court's concern that it was being called upon to pronounce independently upon state law. "To do so," the Court held, "would be to disregard the limitations inherent in our appellate jurisdiction. It is not our function to find our way through a maze of [state] statutes and decisions . . . ."

Id. at pp. A-6, A-7 (quoting *Brillhart*, 316 U.S. at 497).

In stark contrast to *Wilton* and *Brillhart*, of course, this action does not involve solely state law issues. Indeed, the Second Circuit has correctly determined that "resolution of the dispute hinges upon a novel determination of federal law" (Pet. App. C at p. C-16)—"whether maritime losses caused by an insured's recklessness are fortuitous" (Pet. App. A at p. A-7; Pet. App. C at p. C-17)—and has concluded that as a result a federal court must retain jurisdiction and decide this case. (*Ibid.*).

It is precisely because of the dominant role which federal maritime law has in this dispute—and because of the resulting federal interest in this case—that the circumstances surrounding the parties' litigation are, indeed, "fundamentally distinct" from the circumstances of the dispute addressed in *Wilton*. (Pet. App. A at p. A-7; Pet. App. C at p. C-7 n.2). Because federal law provides the rule of decision, this case, unlike *Wilton* and *Brillhart*, does not involve a federal court's "gratuitous interference" with a state court's handling of litigation raising only state law issues, or an "attempt to pronounce independently upon [state] law." *Brillhart*, 316 U.S. at 497. To the contrary, this is a case in which the federal interest is compelling. As the Second Circuit recognized, it is wrong to abstain in a case where, as a result of abstention,

the state court would be required to "pronounce independently" upon a novel federal law issue.[13]

The Second Circuit therefore did not ignore but *followed Wilton* and *Brillhart*. It correctly concluded that, under the *Brillhart* test, because of the importance of federal law issues, the paries' dispute cannot "better be settled" in Texas state court. As a consequence, and in view of the pivotal role a novel question of federal admiralty law plays in this case, it was entirely appropriate for the Second Circuit to determine that continuing federal court involvement is essential to the resolution of the parties' dispute. (Pet. App. A, p. A-7; Pet. App. C, p. C-17).[14]

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[13] The importance of the fortuity issue cannot be overstated. As recognized by the Second Circuit, fortuity is the threshold issue in this coverage dispute, and, by itself, would dispose of this litigation if resolved in favor of Underwriters. (Pet. App. C at p. C-9).

Moreover, as noted by the Second Circuit, Underwriters have raised a number of federal admiralty principles in addition to the "fortuity rule" as examples of some of the federal maritime rules of decision applicable to the parties' dispute. (*Id.*; *see also* Underwriters' Brief in Opposition, *Exxon v. Youell*, No. 94-1871 (filed June 14, 1995), at pp. 17 & 18 n.11). Although the Second Circuit deemed it necessary to examine only the first example of controlling admiralty rules identified by Underwriters—namely, the "fortuity rule"—the applicability of other important federal maritime principles reinforces the correctness of the Second Circuit's conclusion that this case is governed by federal maritime law.

[14] In these circumstances, there is positively no basis for Exxon's call for this Court's "summary reversal" of the Second Circuit's judgment. (Pet. at pp. 18, 19). Exxon could not be more wrong when denouncing the Second Circuit's supposedly "blatant[]" departure from this Court's instructions on remand. (*Id.*). Far from "ignoring" this Court's directive to consider *Wilton*, the Second Circuit *complied* with those instructions, *accepting Brillhart* as the abstention test this Court wished it to apply to this case and proceeding to do just that.

The cases Exxon claims support its suggestion of summary reversal (*see id.*) are all totally inapposite. Those cases, unlike this

C. The Retention of Federal Jurisdiction in No Sense "Undermines" the "Savings to Suitors" Clause.

Equally without merit is Exxon's assertion that the "saving to suitors" clause of 28 U.S.C. § 1333(1) is somehow "undermined" by allowing Underwriters' declaratory suit to proceed in view of Exxon's Texas state court action. (Pet. at p. 17 & n.8). Exxon is wrong when it suggests that the "saving to suitors" clause reflects a Congressional determination that maritime issues should be resolved by state courts—to the exclusion of federal courts—any time the plaintiff chooses a state court forum. (*Id.* at pp. 16, 17). Exxon has twisted the "saving to suitors" clause beyond recognition.

The "saving to suitors" clause simply grants state courts subject matter jurisdiction in certain maritime cases, concurrent with federal courts. *See, e.g., Madruga v. Superior Court*, 346 U.S. 556, 561 (1954). The clause in no sense means—as Exxon would have this Court believe—that state court jurisdiction should be *exclusive*. *See Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847). Merely because the clause *allows* state courts to have *concurrent* jurisdiction over maritime disputes does *not* mean that it is therefore proper to dismiss a federal admiralty action in deference to a state court proceeding. *Id.* Nor does the fact that, pursuant to the "saving to suitors" clause, a state court is competent to *apply* federal maritime law mean that a state court is *better suited* than a federal court to decide admiralty issues. In fact, just the opposite is true, especially in this case where there is a need for a federal court to resolve, as a matter of federal maritime law, the important and novel federal question of whether

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one, involve instances where the circuit court *did* disregard this Court's instructions. *See, e.g., Hutto v. Davis*, 454 U.S. 370 (1982) (circuit court continued to apply, even after remand, the same four-factor test which this Court had expressly disapproved).

the "fortuity rule" bars coverage for the maritime losses caused by Exxon's recklessness.[15]

D. The Second Circuit Properly Dispensed With a Remand to the District Court.

Exxon has made much over the fact that the Second Circuit did not remand this case to the district court for it to apply the *Brillhart* test. In contending that this was improper under *Wilton*, Exxon has effectively claimed that this Court intended to give virtually *unreviewable* discretion to a district court to abstain even in cases raising federal law issues. Exxon has misread *Wilton* and misinterpreted this Court's remand instructions in this case, seeking to impose a requirement that has never existed and that, in the circumstances of this case, would have served no purpose.

Exxon's claim that a remand to the district court was *required* under *Wilton* ignores both the fact that the district court had *already* set forth in detail its reasons for abstaining from this case, and the fact that whatever further decision the district court might have rendered—had the Second Circuit remanded the case for additional consideration—would, in fact, have been reviewable for an abuse of discretion under *Wilton*. 115 S.Ct. at 2144.

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[15] Exxon has cited no authority for its erroneous contention that state court jurisdiction should be exclusive. Rather, Exxon's cases simply discuss the capability of state courts to exercise jurisdiction over admiralty cases. (Pet. at pp. 16-18). Exxon's cases do no more than recite the uncontroverted rule that a state court has the "competency" to *follow* or *apply* established principles of federal maritime law—indeed, state courts are *obligated* to do so—and the inapposite rule that a case may not be *removed* from state court simply because it is a maritime matter. Those cases have no significance here, since the issue before the Second Circuit was not whether the state court was capable of maintaining jurisdiction, but instead whether Underwriters' federal suit was properly dismissed.

Here, of course, the Second Circuit—which had already reviewed the grounds the district court believed justified abstention—was actually in a better position than the district court to apply the *Brillhart* test. Unlike the district court—which had not been involved with this case since its abstention ruling in July, 1994, some 18 months before the Second Circuit rendered its ruling on remand—the Second Circuit was already fully informed. The Second Circuit was thus in a superior position to give all appropriate weight to the various *Brillhart* factors, including the progress of the Texas proceedings—about which it specifically inquired of the parties following this Court's remand. (Pet. App. A at p. A-5).[16]

In its initial petition for certiorari, Exxon claimed that, under the *Brillhart* test, the district court's decision to abstain was justified by the "danger" of piecemeal litigation alone. (*Exxon v. Youell*, No. 94-1871, Pet. at p. 19). This is wrong.

As the Second Circuit properly concluded, principles of *res judicata* render "inconsequential" the risk of inconsistent judgments central to the piecemeal litigation factor because, as a practical matter, the parties and the issues in the parallel proceedings are the same. (Pet. App. C at p. C-16). The Second Circuit also rightly determined that "the possible annoyance that piecemeal litigation may cause here hardly offsets the commanding presence of a federal question of first impression." (*Id.*).

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[16] As the Second Circuit was advised, and as is currently still the case, discovery is continuing in connection with both the Texas action and Underwriters' declaratory suit on a number of issues, including, most notably, the fortuity issue. Indeed, discovery has proceeded jointly in the New York and Texas actions.

Contrary to Exxon's report that the Texas state court has denied Underwriters' motion for summary judgment on fortuity but "has reserved decision" on Exxon's motion on fortuity (Pet. at p. 8), *both* parties' motions were denied. As a result, the fortuity issue, as well as others, remains unresolved.

Now, Exxon urges the dismissal of Underwriters' action, because it claims the parties' dispute can be decided in Texas and is being adjudicated there. (Pet. at pp. 22, 23). The Second Circuit considered and properly rejected this very argument, determining that this case cannot better be settled in Texas.

Upon full and complete review of all pertinent *Brillhart* considerations—which it recited and *applied* (Pet. App. A at pp. A-6, A-7)—the Second Circuit rightly concluded that "based on the novel federal admiralty question presented in this case," it would be an abuse of the discretion allowed under *Brillhart* to dismiss Underwriters' declaratory judgment action. (Pet. App. A at p. A-8). It is fully appropriate for the Second Circuit to have made this determination, rather than to have deferred in the first instance to the district court, which had mistakenly believed the parties' dispute is marked by an "absence of significant federal issues." (Pet. App. D at p. D-13).

Exxon would no doubt have preferred the additional procedural step associated with the further remand to the district court—and the attendant further delay in the exercise of federal jurisdiction. The fact of the matter is that, because the district court's reasons for abstaining were already known to the Second Circuit, a remand was unnecessary.

E. This Case Does Not Require This Court's Further Attention.

At bottom, the Second Circuit did exactly what this Court told it to do. It reconsidered its prior ruling in light of *Wilton*. It applied *Brillhart*. It reached the right result.

At this time—in the immediate aftermath of *Wilton*—there is no semblance of any circuit split on this issue that even begins to suggest that this Court should intervene. Unlike the issue addressed by this Court in *Wilton*

—where the circuits had long considered and vigorously debated the federal role in cases involving only state law concerns—the issue here simply does not require this Court's attention.

In urging this Court to grant certiorari, Exxon asks this Court to assume a case management role that is both unnecessary and inappropriate. This Court—which traditionally has neither scrutinized the particular facts underlying specific cases nor dissected lower court rulings analyzing the effect of a rule on a given set of facts—need not review this case further. Certiorari is therefore inappropriate.

CONCLUSION

Exxon's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 13, 1996

APPENDIX

APPENDIX

APPENDIX

The following list identifies all parent companies and nonwholly owned subsidiaries of Respondents:

ABU DHABI NATIONAL INSURANCE COMPANY

Parent: N/A

Nonwholly owned subsidiaries: N/A

ALLIANZ INTERNATIONAL INSURANCE COMPANY LIMITED

Parent: N/A

Nonwholly owned subsidiaries: N/A

AMERICAN HOME ASSURANCE COMPANY

Parent: American International Group, Inc.

Nonwholly owned subsidiaries: N/A

ARENDAL FORSIKINGSSASKAD A/S

Parent: N/A

Nonwholly owned subsidiaries: N/A

ARIG ARAB INSURANCE GROUP (BSC)

Parent: N/A

Nonwholly owned subsidiaries: N/A

ASSICURARIONI GENERALI S.P.A.

Parent: N/A

Nonwholly owned subsidiaries: N/A

ATLANTIC MUTUAL INSURANCE COMPANY

Parent: Atlantic Mutual Companies

Nonwholly owned subsidiaries: N/A

ATLAS ASSURANCE COMPANY LTD

Parent: Guardian Royal Exchange PLC

Nonwholly owned subsidiaries: N/A

BALTICA FORSIKRING

Parent: N/A

Nonwholly owned subsidiaries: N/A

BISHOPGATE INSURANCE LIMITED

Parent (Jointly owned by): AMEV/VSB 1990 NV; NV AMEV; GROUP AC

Nonwholly owned subsidiaries: N/A

CAISSE INDUSTRIELLE D'ASSURANCE MUTUELLE LANGUEDOC

Parent: N/A

Nonwholly owned subsidiaries: N/A

CHANDOS INSURANCE COMPANY LIMITED

Parent: BASS PLC

Nonwholly owned subsidiaries: N/A

CIGNA INSURANCE COMPANY OF EUROPE S.A.—N.V.

Parent: CIGNA Corporation

Nonwholly owned subsidiaries: N/A

CHRISTIANA GENERAL INSURANCE CORPORATION OF NEW YORK

Parent: UNI Storebrand A/S

Nonwholly owned subsidiaries: N/A

COLONIA INSURANCE COMPANY (UK) LIMITED

Parent: Colonia Versicherung Atiengesellschaft

Nonwholly owned subsidiaries: N/A

COLONIA INSURANCE COMPANY

Parent: Union des Assurances de Paris (UAP)

Nonwholly owned subsidiaries: N/A

COMMERCIAL UNION ASSURANCE COMPANY PLC

Parent: Commercial Union PLC

Nonwholly owned subsidiaries: N/A

COMPAGNIE de REASSURANCE de L'ILE de FRANCE

Parent: N/A

Nonwholly owned subsidiaries: N/A

CONTINENTAL INSURANCE COMPANY

Parent: The Continental Corporation

Nonwholly owned subsidiaries: N/A

CORNHILL INSURANCE PLC

Parent: N/A

Nonwholly owned subsidiaries: N/A

DAI-TOKYO INSURANCE COMPANY (UK) LIMITED

Parent: The Dai-Tokyo Fire and Marine Insurance Company, Limited

Nonwholly owned subsidiaries: N/A

DOMINION INSURANCE COMPANY LIMITED

Parent: La Fondiaria Assicurazioni, S.P.A.

Nonwholly owned subsidiaries: N/A

EAGLE STAR FRANCE

Parent: N/A

Nonwholly owned subsidiaries: N/A

ENGLISH & SCOTTISH MARITIME & GENERAL

Parent: FINAXA

Nonwholly owned subsidiaries: N/A

EXCESS INSURANCE COMPANY LIMITED

Parent: ITT Corporation

Nonwholly owned subsidiaries: N/A

FIDELITY & CASUALTY COMPANY OF NY

Parent: The Continental Group

Nonwholly owned subsidiaries: N/A

FIREMAN'S FUND INSURANCE COMPANY

Parent: Allianz Versicherungs-AG

Nonwholly owned subsidiaries: Fireman's Fund Insurance Co. of Iowa; Fireman's Fund Insurance Co. of Wisconsin; Fireman's Fund Insurance Co. of New Jersey; San Francisco Insurance Co. (U.K.) Ltd.

FIREMAN'S FUND INSURANCE COMPANY OF NEWARK

Parent: The Continental Corporation

Nonwholly owned subsidiaries: N/A

FOLKSAM INTERNATIONAL INSURANCE COMPANY (UK) LIMITED

Parent: Folksam General Mutual Insurance Society of Sweden

Nonwholly owned subsidiaries: N/A

FUJI FIRE & MARINE INSURANCE COMPANY (UK) LIMITED

Parent: The Fuji & Marine Insurance Company Limited

Nonwholly owned subsidiaries: N/A

GJENSIDIGE NORSK SKADEFORSIKRING

Parent: N/A

Nonwholly owned subsidiaries: Nimbus A/S; Saminvest A/S; Nordic Mutual AB

HAFNIA FORSIKRING (NOW KNOWN AS CODAN INSURANCE LIMITED)

Parent: N/A

Nonwholly owned subsidiaries: N/A

HANSA MARINE INSURANCE COMPANY

Parent: Trygg Hansa SPP GROUP

Nonwholly owned subsidiaries: N/A

HANSA MARINE INSURANCE COMPANY (UK) LIMITED (NOW KNOWN AS HANSA RE & MARINE INSURANCE COMPANY (UK) LIMITED)

Parent: Trygg-Hansa SPP Holding AB

Nonwholly owned subsidiaries: N/A

INDEMNITY MARINE ASSURANCE COMPANY LIMITED

Parent: Commercial Union PLC

Nonwholly owned subsidiaries: N/A

INDUSTRIAL MUTUAL INSURANCE COMPANY (NOW KNOWN AS PATRIA REINSURANCE COMPANY LIMITED)

Parent: N/A

Nonwholly owned subsidiaries: Insurance Co. of Finland Ltd.: Oy Haveri Ab; Patria Insurance Co. Ltd.; Finnish Marine Insurance Co. Ltd.; Finnish Holdings, Ltd.; Otso Loss of Profits Insurance Co.,

Ltd.; Finnish Industrial Security Co.; Nordimex SA; Nordic Union Reinsurance Corp.; Nova Life Insurance Co.; Western Reinsurance Co.; United Reinsurance Co. of Ireland; Arabian Scandinavian Insurance Co., Ltd.; La Licorne Cie de Reassurances; Finnisurance (Services) Ltd.

INSURANCE COMPANY OF NORTH AMERICA

Parent: CIGNA Corporaiton

Nonwholly owned subsidiaries: N/A

INSURANCE COMPANY OF NORTH AMERICA (UK) LIMITED

Parent: CIGNA Corporation

Nonwholly owned subsidiaries: N/A

INTERNATIONAL INSURANCE COMPANY OF HANNOVER LIMITED

Parent: HDI Haftpfhchtverband der Deutchen Industre VaG

Nonwholly owned subsidiaries: N/A

LA CONCORDE COMPAGNIE D'ASSURANCES CONTRE LES RISQUES DE TOURS NATURE

Parent: GENERALI

Nonwholly owned subsidiaries: N/A

LA REUNION FRANCAISE

Parent: N/A

Nonwholly owned subsidiaries: Societe Parisienne de Souscription; Robert Malatier Limited

LA REUNION FRANSAISE SOC. ANON. D'ASSURANCES ET DES REASSURANCES

Parent (The following have at least 1/10 share of Capital):

L'Union Des Assurances De Paris I.A.R.D.; L'Union Des Assurances De Paris-VIE, La France I.A.R.D.; La Concorde; Hannover Ruckversicherungs Aktien geseuschaft; Abeille Assurances; Groupe Sun Alliance et London Assurance

Nonwholly owned subsidiaries: La Reunion Europeenne; La Reunion Acrienue; La Reunion Spatiale; La Societe Parisienne De Souscription

LEADENHALL INSURANCE LTD

Parent: (Jointly owned by): AMVES/VSB 1990 NV; NV AMEV; GROUP AG

Nonwholly owned subsidiaries: N/A

LEGAL & GENERAL ASSURANCE SOCIETY LIMITED (NOW KNOWN AS LEGAL & GENERAL INSURANCE LIMITED)

Parent: Legal & General Group PLC

Nonwholly owned subsidiaries: N/A

LOMBARD CONTINENTAL INSURANCE PLC (NOW KNOWN AS CONTINENTAL MANAGEMENT SERVICES LIMITED)

Parent: The Continental Corporation

Nonwholly owned subsidiaries: N/A

THE LONDON ASSURANCE

Parent: Sun Alliance Group PLC

Nonwholly owned subsidiaries: N/A

LONDON & HULL MARITIME INSURANCE COMPANY LIMITED (NOW KNOWN AS AXA MARINE & AVIATION INSURANCE (UK) LIMITED)

Parent: N/A

Nonwholly owned subsidiaries: N/A

THE MARINE INSURANCE COMPANY LIMITED

Parent: Royal Insurance Holdings PLC
Nonwholly owned subsidiaries: N/A

MINSTER INSURANCE COMPANY LIMITED (NOW KNOWN AS GAN MINSTER INSURANCE COMPANY LIMITED)

Parents GAN Group

Nonwholly owned subsidiaries: N/A

NATIONAL EMPLOYERS MUTUAL

Parent: N/A

Nonwholly owned subsidiaries: NEM Business Services Ltd.; VJ Wright 'Underwriting' Ltd.; Compensation Business Services Pty. Ltd.; NEM Reinsurance Corp. (USA); NEM Insurance Co. Ltd. (Zimbabwe) (Pte); National Employers' General Insurance Co. Ltd. (South Africa); NEM (Jamaica) Ltd.; NEM (Bermuda) Ltd.; NEM Insurance Co. (Nigaria); NEM (West Indies) Insurance Limited; National Underwriters Ltd.; NEM Insurance Ltd.; NEM Assurance des Regions Francaises SA; NEM Insurance (Malaysia) Sdn Bhd

NATIONAL UNION FIRE INSURANCE COMPANY

Parent: American International Group, Inc.

Nonwholly owned subsidiaries: N/A

NAVIGATORS INSURANCE COMPANY

Parent: The Navigators Group, Inc.

Nonwholly owned subsidiaries: N/A

NEW HAMPSHIRE INSURANCE COMPANY

Parent: N/A

Nonwholly owned subsidiaries: N/A

NEW HAMPSHIRE IUSURANCE COMPANY

Parent: American International Group, Inc.

Nonwholly owned subsidiaries: N/A

NEW YORK MARINE AND GENERAL INSURANCE COMPANY

Parent: NYMAGIC

Nonwholly owned subsidiaries: N/A

NIPPON FIRE & MARINE INSURANCE COMPANY LIMITED

Parent: Nippon Fire & Marine Insurance Company Ltd. of Tokyo

Nonwholly owned subsidiaries: N/A

NORGES BRANNKASSE MUTUAL INSURANCE COMPANY (UNI) (NOW KNOWN AS UNI STOREBRAND)

Parent: UNI Storebrand A/S

Nonwholly owned subsidiaries: N/A

NORSKE TRITON INSURANCE COMPANY LIMITED (NOW KNOWN AS STAR INSURANCE LIMITED)

Parent: N/A

Nonwholly owned subsidiraies: N/A

NORTHERN ASSURANCE COMPANY NO. 6

Parent: Commercial Union PLC

Nonwholly owned subsidiaries: N/A

NORWICH UNION FIRE INSURANCE SOCIETY LIMITED

Parent: N/A

Nonwholly owned subsidiaries: Canada Security Assurance Co.; Ilios Greek Insurance Co. Ltd.; Heritage Insurance Company of Zimbabwe Limited

OCEAN MARINE INSURANCE

Parent: Commercial Union PLC

Nonwholly owned subsidiaries: N/A

OMNIUM INSURANCE & REINSURANCE COMPANY LIMITED

Parent: N/A

Nonwholly owned subsidiaries: N/A

ORION INSURANCE COMPANY P.L.C.

Parent: N/A

Nonwholly owned subsidiaries: Orion Insurance (General) PLC.; Orion Insurance Management Company Limited

PEARL ASSURANCE PUBLIC LIMITED COMPANY

Parent: Pearl Group PLC

Nonwholly owned subsidiaries: Companhia de Segurda Monarca

PENNSYLVANIA LUMBERMEN'S MUTUAL INSURANCE COMPANY

Parent: N/A

Nonwholly owned subsidiaries: N/A

PHOENIX ASSURANCE PUBLIC LIMITED COMPANY

Parent: Sun Alliance Life Limited

Nonwholly owned subsidiaries: Compania de Sequros La Fenix Peruana

POLARIS ASSURANCE A/S (NOW KNOWN AS UNI STOREBRAND INSURANCE COMPANY (UK) LIMITED)

Parent: UNI Storebrand International Insurance A/S

Nonwholly owned subsidiaries: N/A

BEST AVAILA

POOL TRANSPORT EAGLE STAR L'INDEPENDENCE POOL

Parent: N/A

Nonwholly owned subsidiaries: N/A

PRESERVATRICH FONCIERE T.I.A.R.D. COMPAGNIE D'ASSURANCES

Company dissolved in 1988.

PROGRESSIVE CASUALTY INSURANCE COMPANY

Parent: The Progressive Corporation

Nonwholly owned subsidiaries: N/A

THE PRUDENTIAL ASSURANCE COMPANY LIMITED

Parent: N/A

Nonwholly owned subsidiaries: Edger Investments Ltd.; Prudential Annuities Ltd.; Prudential Leven NV; Prudential Life of Ireland Limited; Prudential Pensions Ltd., Prudential Vita SPA; The Prudential Assurance Company of Singapore (Private) Ltd.; The Prudetial Life Assurance Company of England (Canada); The Standard Trust Ltd.; The Prudential Assurance Company of Kenya Ltd.; St. Helen's Trust Ltd.

QATAR INSURANCE AND REINSURANCE COMPANY

Parent: N/A

Nonwholly owned subsidiaries: N/A

THE REINSURANCE CORPORATION OF NEW YORK

Parent: Piedmont Management Co., Inc.

Nonwholly owned subsidiaries: N/A

LABLE COPY

REPUBLIC INSURANCE COMPANY

Parent: Winterhur Schweizerische Versicherungs Gesellschaft

Nonwholly owned subsidiaries: N/A

RIUNIONE ADRIATICA di SICURTA

Parent: Allianz Holding A.G.

Nonwholly owned subsidiaries: N/A

SAMVIRKE SK ADEFORSIKRING A/S

Parent: Samvirke Group Ltd.

Nonwholly owned subsidiaries: Folksamerica; Folksam UK; ALKA

SCOR (U.K.) REINSURANCE COMPANY LIMITED (NOW KNOWN AS SCOR UK COMPANY LIMITED)

Parent: SCOR S.A.

Nonwholly owned subsidiaries: Finimo UK Ltd.

THE SCOTTISH LION INSURANCE COMPANY LIMITED

Parent: China Merchants Holdings (UK) Ltd.

Nonwholly owned subsidiaries: N/A

SIRIUS INSURANCE COMPANY LIMITED (NOW KNOWN AS LF INSURANCE COMPANY, LIMITED)-INDUSTRIAL AND MARINE)

Parent: N/A

Nonwholly owned subsidiaries: N/A

SIRIUS INSURANCE COMPANY (UK) LIMITED

Parent: ABB Asea Brown Boveri Ltd.

Nonwholly owned subsidiaries: N/A

SKANDIA INTERNATIONAL INSURANCE CORPORATION

Parent: Skandia Insurance Company Ltd.

Nonwholly owned subsidiaries: N/A

SKANDIA U.K. INSURANCE P.L.C.

Parent: Skandia Insurance Company Ltd.

Nonwholly owned subsidiaries: N/A

SOCIETE COMMERCIAL E de REASSURANCE

Parent: N/A

Nonwholly owned subsidiaries: SCOR Paris; SCOR U.S. Corp.; Ecusor; Multiscor; SCOR Reinsurance (ASIA) Co. Ltd.; SCOR Reinsurance Australia; SCOR Reinsurance Co. of Canada; SCORLUX

SOVEREIGN MARINE AND GENERAL INSURANCE COMPANY LIMITED

Parent: Willie Corroon Group PLC,

Nonwholly owned subsidiaries: N/A

SPHERE DRAKE INSURANCE PLC

Parent: Sphere Drake

Nonwholly owned subsidiaries: N/A

STOREBRAND INSURANCE COMPANY (UK) LIMITED

Parent: UNI Storebrand International Insurance A/S

Nonwholly owned subsidiaries: N/A

STOREBRAND REINSURANCE COMPANY LIMITED

Parent: UNI Storebrand International Insurance A/S

Nonwholly owned subsidiaries: N/A

SUMITOMO MARINE & FIRE INSURANCE COMPANY (EUROPE) LIMITED

Parent: The Sumitomo Marine & Fire Insurance Company, Ltd.

Nonwholly owned subsidiaries: SPAC Management (Luxembourg) SA

SWITZERLAND INSURANCE COMPANY (UK) LIMITED (NOW KNOWN AS SR INTERNATIONAL BUSINESS INSURANCE COMPANY LIMITED)

Parent: Swiss Reinsurance Company

Nonwholly owned subsidiaries: N/A

TAISHO MARINE & FIRE INSURANCE COMPANY (UK) LIMITED

Parent: Mitsu Marine & Fire Insurance Co. Ltd.

Nonwholly owned subsidiaries: N/A

TERRA NOVA INSURANCE COMPANY LIMITED

Parents: Aetna Life & Casualty Company; CIGNA Corporation; Marsh & McLennen Companies (Through Guy Carpenter & Co., through C.T. Bowring & Co.); Trycourt Financial Holdings

Nonwholly owned subsidiaries: Ian Morton Underwriting Agency Limited

THE THREADNEEDLE INSURANCE COMPANY LIMITED

Parent: Eagle Star Reinsurance Company Limited

Nonwholly owned subsidiaries: N/A

THE TOKIO MARINE & FIRE INSURANCE COMPANY LIMITED

Parent: N/A

Nonwholly owned subsidiaries: TM Claims Service Inc.; Tokio Marine Management Inc.; Tokio Re Corporation; The Tokio; Trans Pacific Insurance Company; Tokio Marine Realty Co. Ltd.; Tokio Marine Asset Management; America Latina Companhia de Seguros; La Rural del Paraguay SA; Tokio Marine Internacional Sociedad; Tokio Marine de Venczuela, C.A.; Tokio Marine Europe Limited; The Tokio Marine Capital Research Ltd.; Tokio Marine Property Limited; TM Management Services; The Tokio Marine & Fire Insurance Company (UK) Limited; Tokio Reinsurance Company Ltd.; The Tokio Marine Management (Australia) Pty., Ltd.; Pan-Malayan Insurance Corporation; The Sri Muang Insurance Co. Ltd.; Tokio Marine South-East Servicing Company Ltd.; Berjaya General Insurance Sdn Bhd.; The Tokio Marine & Fire Insurance Company (Singapore) PLC.; Tokio Management Services (Asia) PLC, Ltd.; P.T. Asuransi Tokio Marine; Tokio Marine International Fund (Bahama) Company Limited; The Arab-Eastern Insurance Company Limited, E.C.; The Wuphoon Insurance Company Ltd.

THE TOKIO MARINE & FIRE INSURANCE COMPANY (UK) LIMITED

Parent: The Tokio Marine & Fire Insurance Company Ltd.

Nonwholly owned subsidiaries: N/A

TUREGUM INSURANCE COMPANY

Parent: Zurich Versicherungs-GES

Nonwholly owned subsidiaries: N/A

UNITED FIRE & CASUALTY COMPANY

Parent: N/A

Nonwholly owned subsidiaries: N/A

UNITED REINSURANCE CORPORATION OF NEW YORK (NOW KNOWN AS RECOR INSURANCE COMPANY INC.)

Parent: N/A

Nonwholly owned subsidiaries: N/A

VESTA (UK) INSURANCE COMPANY LIMITED

Parent: Forsikringsaktiebolaget Skandia

Nonwholly owned subsidiaries: N/A

WAUSAU INSURANCE COMPANY (UK) LIMITED

Parent: Employers Insurance of Wausau

Nonwholly owned subsidiaries: N/A

THE WORCESTER INSURANCE COMPANY

Parent: Harleysville Group, Inc.

Nonwholly owned subsidiaries: N/A

THE YASUDA FIRE & MARINE INSURANCE COMPANY LIMITED

Parent: N/A

Nonwholly owned subsidiaries: Yasuda Fire & Marine Insurance Co. of America

THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE LIMITED

Parent: The Yasuda Fire & Marine Insurance Company Ltd.

Nonwholly owned subsidiaries: Marnix Central Insurance Services, Ltd.

THE YORKSHIRE INSURANCE COMPANY

Parent: General Accident PLC

Nonwholly owned subsidiaries: N/A